Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

LINDA HOFFMANN-PUGH,

Petitioner,

v.

MARY T. KEENAN, as District Attorney for the Twentieth Judicial District of the State of Colorado,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Colorado Rules of Criminal Procedure 6.2 and 6.3 provide that the proceedings of state grand juries shall be secret and that grand jury witnesses who appear before them must take an oath to keep their testimony secret. Violations of the Colorado grand jury witness oath are punishable by contempt proceedings, unless or until an indictment or grand jury report are issued.

The question presented is whether Colorado's grand jury witness secrecy rules 6.2 and 6.3 are an unconstitutional infringement on the First Amendment rights of witnesses appearing before the grand jury and should be invalidated under this Court's decision in *Butterworth v. Smith*, 494 U.S. 624 (1990).

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The district court's opinion (Daniel, W.Y.) granting petitioner Linda Hoffmann-Pugh's summary judgment motion (Appendix ("Pet. App.") 9a-17a) is unpublished. The court of appeals' opinion (per Seymour, joined by Holloway and Ebel, JJ.) reversing (Pet. App. 1a-8a) is published at 338 F.3d 1136.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on August 6, 2003. Petitioner Linda Hoffmann-Pugh invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

RULES INVOLVED

Colorado Rules of Criminal Procedure 6.2 and 6.3 are reprinted in the Appendix at 18a.

STATEMENT OF THE CASE

This is an action for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 to enforce the First Amendment rights of the plaintiff.

Colorado Rules of Criminal Procedure 6.2 and 6.3 provide that the proceedings of the grand jury shall be secret and the grand jury witnesses must take an oath to keep their testimony secret. In pertinent part, Rule 6.2 states:

> All persons associated with a grand jury and its investigations or functions should at all times be aware that a grand jury is an investigative

> body, the proceedings of which shall be secret. Witnesses or persons under investigation should be dealt with privately to insure fairness. The oath of secrecy shall continue until such time as an indictment is made public, if an indictment is returned, or until a grand jury report dealing with the investigation is issued and made public as provided by law.

Rule 6.3 provides that the following oath shall be administered to each witness testifying before the grand jury:

> DO YOU SWEAR (AFFIRM), UNDER PENALTY OF PERJURY, THAT THE TESTIMONY YOU ARE TO GIVE IS THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, AND THAT YOU WILL KEEP YOUR TESTIMONY SECRET, EXCEPT TO DISCUSS IT WITH YOUR ATTORNEY, OR THE PROSECUTOR, UNTIL AND UNLESS AN INDICTMENT OR REPORT IS ISSUED?

Violations of the grand jury oath are punishable by contempt proceedings. Ms. Hoffmann-Pugh testified under the Rule 6.3 oath before the grand jury that investigated the murder of JonBenet Ramsey from 1998 until October 1999, when its term ended by law.

No indictment or grand jury report concerning that murder has been issued.

Because there is no statute of limitations on the crime of murder under Colorado law, however, a new grand jury could consider evidence and continue the investigation.

Ms. Hoffmann-Pugh wants to write a book describing her grand jury testimony about this unsolved murder, discuss it with the media, and answer questions about it from members of the public. She has not done so for fear of facing contempt proceedings for violation of the grand jury secrecy requirements.

Ms. Hoffmann-Pugh claims, and the district court agreed, that the Colorado secrecy rules violate her First Amendment rights by requiring her to remain silent even after the grand jury ended its term without issuing an indictment or report.

The district court determined that this Court's decision in *Butterworth v. Smith*, 494 U.S. 624, 108 L. Ed. 2d 572, 110 S. Ct. 1376 (1990), was controlling and granted summary judgment in favor of Ms. Hoffmann-Pugh. The court cited *Butterworth* as holding that to the extent a rule or statute "prohibits a grand jury witness from disclosing his own testimony after the term of the grand jury has ended, it violates the First Amendment." (quoting *Butterworth*, 494 U.S. at 626).

The court of appeals, however, disagreed with the district court's findings and reversed the lower court's grant of summary judgment.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

The petition should be granted for the following reasons:

Colorado Rules of Criminal Procedure 6.2 and 6.3 constitute a blanket prohibition of a grand jury witnesses' disclosure of their own grand jury testimony to anyone except their attorney or a prosecutor, unless or until an indictment or a report is issued, and violate the First Amendment to the United States Constitution because:

(a) the rules indiscriminately and permanently impose, in the event there is no grand jury indictment or report, under color of state law, a direct burden upon the exercise of a witness's fundamental right of free speech, while failing to serve any compelling state interest once a grand jury term has expired; and

(b) the goals traditionally deemed to justify secrecy in grand jury proceedings do not require for their preservation the blanket and potentially permanent prohibition on speech imposed therein once a grand jury term has ended, since such goals could be accomplished through means that are less restrictive on constitutionally protected freedoms; and

(c) the rules provide criminal penalties for all forms of disclosure, except for those made to a witness' attorney or a prosecutor, thereby making it a crime to utter the truth, thereby "chilling" the right to speak by people, like the plaintiff, who would otherwise exercise that right; and

(d) Rules 6.2 and 6.3 are contrary to this Court's ruling in *Butterworth v. Smith*, 494 U.S. 624, 110 S. Ct. 1376, 108 L. Ed. 2d 572 (1990), in which the Court held that

a State's interest in preserving grand jury secrecy was either not served, or was insufficient to warrant, proscription of truthful speech on matters of public concern, and that a State statute that had the effect of prohibiting witnesses from ever disclosing their testimony violates the First Amendment insofar as it prohibits a witness from disclosing his own testimony after a grand jury's term has ended.

A. The District Court Correctly Ruled That Colorado's Grand Jury Witness Secrecy Oath Is An Overbroad Restriction Upon Freedom Of Speech.

Strict scrutiny is the proper standard for evaluating Rules 6.2 and 6.3. To justify a content-based ban on speech, a state must show both that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Boos v. Barry*, 108 S. Ct. 1157, 1164 (1988); *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878 (2000) ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest." *Id.* at 1886); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

The proper standard for testing a blanket prohibition of truthful speech is articulated in *Landmark Communications* and *Smith v. Daily Mail*, 443 U.S. 97 (1979). *See also Minneapolis Star v. Minnesota*, 460 U.S. 575, 587 n.7 (1983). In fact, Rules 6.2 and 6.3 are remarkably similar to the statute invalidated in *Landmark Communications*, as both make it a crime to communicate information regarding a public investigative body, no matter how that information was obtained. Every court that has considered the issue has rightly concluded that the rationales of *Landmark Communications* and similar precedents prohibit criminal punishment of persons who file a complaint with an

investigative body and then speak about their complaint during the confidential investigation. *See First Amendment Coalition v. Judicial Inquiry & Review Bd.*, 784 F.2d 467, 477-79, 481 (3d Cir. 1986) (en banc); *Doe v. Gonzalez*, 723 F. Supp. 690, (S.D. Fla. 1988), *aff'd*, 886 F.2d 1323 (11th Cir. 1989); *Bridges v. California*, 314 U.S. 2523 (1941) (speech by party during pendency of lawsuit). It is noteworthy that these cases invalidated even a temporary ban on the speech of voluntary participants during an ongoing investigation. The instant case involves the more extreme situation of a witness who was compelled under the threat of a subpoena to testify to the investigative body and then was silenced after the investigation ended.

A *strict scrutiny* is especially appropriate in this case because Rules 6.2 and 6.3 outlaw and chill "core speech" lying at the very heart of the First Amendment. Hence, "'the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.'" *Landmark Communications*, 435 U.S. at 845, quoting *Bridges v. California*, 314 U.S. at 263. *See also Wood v. Georgia*, 370 U.S. 375, 384, 392-93 (1962); *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946) (requiring a "solidity of evidence" to establish imminent danger).

Rules 6.2 and 6.3 forbid a witness ever to discuss or use information that he himself developed and possessed before he was required to divulge it to the grand jury. The witness is silenced without any particularized examination of potential detrimental effects. The dangers created by Rules 6.2 and 6.3, therefore, involve blanket government silencing of witnesses and monopolization of information developed by private citizens. In this instance the plaintiff does not seek to obtain the testimony of any other witnesses. Indeed, she does not seek any

information at all from the grand jury, with the possible exception of a transcript of her actual words recorded verbatim, because she already has the information. Linda Hoffmann-Pugh simply wants to disseminate her own knowledge about the facts of the JonBenet Ramsey murder case, and to relate an account of her personal experiences, without being subjected to criminal prosecution. *See In re Sealed Motion*, 880 F.2d 1367, 1370 n.6 (D.C. Cir. 1989).

Finally, the State overlooks the stigma that can attach to a witness who testifies before a grand jury. The public often unfairly presumes that a witness called before the grand jury has participated in wrongdoing. To the extent this perception exists, Rules 6.2 and 6.3 prevent Linda Hoffmann-Pugh, and others similarly situated, from attempting to ameliorate this stigma because they cannot discuss any aspect of their experience. When grand jury proceedings are clouded by secrecy, every witness who appears before the grand jury may be considered the "target" of the investigation by his employer, friends, and associates. If false rumors appear to link the witness with the grand jury investigation, the witness cannot protect himself. Nor can witnesses help the "target" of a grand jury investigation salvage his reputation. Rules 6.2 and 6.3 prevent a witness from declaring "I told the grand jury that he [the 'target'] was innocent." In effect, the Rules permit the State to silence the "target's" supporters. An individual should not be deprived of the right to respond to the coercive power of the government by being permanently silenced. "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878, 1886 (2000)

B. The District Court Correctly Held That Colorado's Interests In Grand Jury Secrecy Can Be Protected By Means That Are Less Restrictive Of Witnesses' First Amendment Freedoms.

This Court has repeatedly insisted that a statute, to be considered "narrowly drawn," must target and eliminate "no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 108 S. Ct. 2495, 2502 (1988); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-10 (1984). A total ban can be considered narrowly tailored "only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby*, 108 S. Ct. at 2502-03. Colorado seeks to protect the integrity of its grand jury system by keeping all proceedings eternally secret. Hence, Rules 6.2 and 6.3 do much more than eliminate the exact source of the perceived evil. In fact, they are not the least restrictive means of addressing either the general concerns of Colorado or the specific interests of the parties.

Colorado's own justice system is telling proof that witness restrictions are entirely unnecessary. Like many states, Colorado can commence a prosecution by either indictment or information. However, in Colorado, the vast majority of prosecutions – perhaps ninety-six percent – begin by information. The interests in secrecy are also in these prosecutions. Yet, these investigations, which constitute over ninety-six percent of the prosecutions in Colorado, are successfully conducted without any witness secrecy whatsoever. Witnesses who speak to law enforcement officers may immediately reveal anything they have learned about the investigation. Having made the vast majority of investigations an open book, it is difficult for Colorado to argue that it has a compelling need to restrain witnesses in the four percent of those

cases that proceed by way of grand jury indictment rather than prosecutor's information.

As proof that restraining witnesses from speaking about their testimony is unnecessary, this Court need look no further than to examine the federal grand jury system. Each year thousands of federal indictments are presented without any statutory gag on witnesses. Rule 6(e) of the Federal Rules of Criminal Procedure specifically excludes grand jury witnesses from those court personnel bound by any obligation of secrecy. Thus, Rule 6(e) "does not impose any obligation of secrecy on witnesses." (*See* Fed. R. Crim. P. 6(e) advisory committee's note). Effective in 1946, Rule 6(e)'s fifty-five-year history is unequivocal proof, borne out by literally hundreds of thousands of federal indictments, that a grand jury can perform its functions successfully without any need to gag witnesses. As one commentator put it, "no empirical evidence" has suggested that permitting witnesses to speak in the federal system "has in any way interfered with the functions of the grand jury." Brown, *Witnesses and Grand Jury Secrecy*, 11 Am. J. Crim. L. 169, 181 (1983).

> There is no evidence that this breach of secrecy has diminished the effectiveness of the grand jury system or adversely affected the ability of the government to investigate crime and bring offenders to justice.

In re Russo, 53 F.R.D. 564, 570 (C.D. Ca. 1971).

The federal system has not acted in isolation. This Court in *Butterworth v. Smith*, 494 U.S. 624, 635 observed that its own survey revealed that at least thirty-five of the fifty-one states have no restrictions on witness secrecy at all. Thus Colorado is one of a minority of jurisdictions imposing any ban on the speech of witnesses who are called to testify in front of grand juries.

As well as proving that there is no good "public policy" reason for secrecy, the federal and state experiences demonstrate that there is no long common-law tradition of secrecy with regard to witnesses appearing before the grand jury. In the federal system, for example, witnesses were free to speak in most federal jurisdictions long before Rule 6(e) was enacted. According to *In re Russo*, only 33 of 85 federal district courts required witness secrecy oaths prior to the enactment of Rule 6(e). *Id.* at 570. (*See, e.g., United States v. Amazon Industrial Chemical Corp.*, 55 F.2d 254 (D. Md. 1931)). State case law has recognized a witness's right to speak without fear of prosecution as early as 1854. *See Ashburn v. Georgia*, 15 Ga. 246 (Ga. 1854).

Despite any "policy" argument the State of Colorado may make (e.g., that this Court must defer to Colorado's decision to gag its grand jury witnesses just as it must defer to the federal and state jurisdictions that have chosen otherwise), this Court noted in a similar context that matters impacting on freedom of speech cannot be treated as "policy" decisions. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications*, 435 U.S. at 845. Indeed, in *Landmark Communications*, this Court based its finding of unconstitutionality in part on the fact that more than forty other states with similar review commissions had not found it necessary to enforce confidentiality through the use of criminal sanctions. *Id.* at 841.

C. The District Court Correctly Ruled That Colorado Rules 6.2 And 6.3 Represent An Unconstitutional Restraint On News Dissemination.

Colorado Rules 6.2 and 6.3 operate as both a prior restraint on speech and as a subsequent punishment of those who disclose their grand jury testimony to the media. Grand jury witnesses are prohibited from disclosing their own testimony and the news

media from disseminating the testimony of witnesses who make such disclosures. A person who violates these prohibitions can be held in criminal contempt. Book publishers and news media who might be interested in Linda Hoffmann-Pugh's account of her grand jury witness testimony realize that she risks legal sanctions by publishing her story and therefore refuse to publish it. The Rules, moreover, have the effect of not only "chilling" publication of the plaintiff's account, but of also acting as a "prior restraint." A perfect example of this "chilling" effect, and the absurd limits to which it can be carried, is to be found on page two, paragraph six of the Boulder County Attorney's Answer to Linda Hoffmann-Pugh's Complaint ("Defendant is not able to comment on whether or not Plaintiff testified before a grand jury *due to the grand jury secrecy rules.*) (emphasis added).

As this Court recognized in *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976):

> Prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights . . . The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events.

Id. at 559. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against constitutional validity." *New York Times v. United States*, 403 U.S. 713, 714 (1971) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (citations omitted).

Justice Holmes first noted that the First Amendment protects speakers against being punished for their utterances as well as against prior restraints. *Schenck v. United States*,

249 U.S. 47, 51-52 (1919). Since then, this Court has repeatedly held that laws and court rulings penalizing speakers for contempt for discussing or criticizing government actions are unconstitutional. *See, e.g., Bridges v. California*, 314 U.S. 252 (1941) (voiding publisher's contempt for criticizing a judge's action in a labor dispute): *Pennekamp v. Florida*, 328 U.S. 331 (1946) (voiding contempt for inaccurate accusation in newspaper during grand jury proceeding that judges were lenient toward certain individuals under grand jury investigation); *Craig v. Harney*, 331 U.S. 367 (1947) (voiding media contempt for criticizing judge's action in civil case); *Wood v. Georgia*, 370 U.S. 375 (1961) (voiding county sheriff's contempt for charging publicly that grand jury was being used for political purposes and for interfering with the grand jury.)

On numerous occasions this Court has concluded that States cannot constitutionally impose criminal or civil penalties for publishing information lawfully obtained by the news media from judicial records, other government documents or by employing routine reporting techniques. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (rape victim's name obtained from document court clerk permitted reporter to read); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (information about secret judicial inquiry board proceeding); *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979) (name of juvenile homicide suspect obtained from police and prosecutor); The *Florida Star v. B.J.F.*, 109 S. Ct. 2603 (1989) (rape victim's name obtained from document sheriff placed in press room).

In *Schenck*, Justice Holmes asserted that sanctions may be imposed against a speaker only when "the words used . . . create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." 249 U.S.

at 52. Looking back on the line of cases refining Justice Holmes' standard, this Court stated in *Bridges v. California*, 314 U.S. 252 (1941), that:

> What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.

Id. at 263.

This Court has stated that prior restraints on publication of information reporters obtain pose an even greater threat to First Amendment interests than statutes which penalize speakers after the fact.

> A prior restraint, by contrast [to a post-publication penalty] and by definition, has an immediate and irreversible sanction. If it can be said that the threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it a least for a time.

Nebraska Press, 427 U.S. at 559 (footnote omitted).

It does not matter whether application of Rules 6.2 and 6.3 to grand jury witnesses is viewed as a prior restraint or a punishment after the fact. Under the decisions cited above, it could pass constitutional muster only if Colorado could demonstrate a compelling state interest in preventing witnesses from disclosing their own testimony and that, in the case at bar, disclosure would pose a "clear and present danger" to that interest. It would have to demonstrate that the grand jury witness secrecy rules are narrowly tailored to effectively serve that

interest without imposing an unnecessary burden on protected expression. *Nebraska Press*, 427 U.S. at 562.

However, the mere existence of a generalized state interest, no matter how compelling, is not sufficient to deprive a person of First Amendment protection. The State must demonstrate the need for secrecy on a case-by-case basis and it has provided no explanation of how disclosure by former Ramsey family housekeeper Linda Hoffmann-Pugh of her own grand jury testimony after the grand jury has adjourned would jeopardize any of the State's interests. The State has not even claimed that this grand jury investigation or witness is unique, justifying a restraint on witness disclosure in this case. It is precisely this vagueness with respect to the rights the State is attempting to uphold that make Rules 6.2 and 6.3 unconstitutional. The Supreme Court has held that perhaps the single most important factor affecting the clarity the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights.

D. The District Court's Ruling Accurately Describes The Colorado Rules, Which Are Unconstitutional Under *Butterworth*.

The court of appeals argues that because the Colorado rules do not preclude a witness from disclosing the information a witness acquired on his or her own before entering the grand jury room, those rules are not unconstitutional under *Butterworth*.

Nothing could be further from the truth.

To begin with, there is nothing in the plain language reading of the grand jury secrecy oath that would lead a witness to believe they were at liberty to divulge the gist of their grand jury

testimony, or to believe that referencing their discussions so as *not* to include any mention of the grand jury process would protect them from criminal contempt of court. Rule 6.3 merely states: "that you will keep your testimony secret . . . until and unless an indictment or report is issued." It is precisely because of the vagueness in the meaning of the words "keep your testimony secret" that a witness is "chilled" in their speech. The witness has to *guess* whether the word "testimony" means "verbatim" or "gist" and whether referencing their grand jury testimony discussion means "direct" or "indirect."

Vague rules and laws violate two fundamental principles of due process: (1) they leave the public (i.e., grand jury witnesses) *guessing* as to what actions are proscribed (i.e., verbatim recounting of testimony while referencing the grand jury or case discussion in which a reasonable inference can be drawn by the listener that the subject of conversation was the topic of a witness' testimony before the grand jury); and (2) they invite arbitrary and discriminatory enforcement by giving unbridled discretion to law enforcement officers (i.e., the defendant attorney's own admission that he is unable to make the simple observation in a Statement of Undisputed Facts that the plaintiff appeared before the grand jury because he *believes* he will violate Colorado's grand jury secrecy rules.) *Grayned v. City of Rockford*, 408 U.S. 104, 109-09 (1972); *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

The vagueness of the meaning of Rule 6.3's oath is a particular problem since it regulates the grand jury witness' freedom of expression. This Court has ruled that perhaps the single most important factor affecting the clarity that the Constitution demands of a law or rule is whether it threatens to *inhibit* the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or

association, a more stringent vagueness test should apply. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). In short, "[p]recision of regulation . . . must be the touchstone" where free expression is concerned. *NAACP v Button*, 371 U.S. 415, 438 (1963). Such exactitude is necessary since "[u]ncertain meanings" inevitably lead citizens to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Id.* at 438.

E. The District Court Correctly Held That Rules 6.2 And 6.3 Are Contrary To This Court's Ruling In *Butterworth v. Smith.*

This Court, in *Butterworth v. Smith*, 494 U.S. 624 (1990), held that a State's interest in preserving grand jury secrecy was either not served or was insufficient to warrant proscription of truthful speech on matters of public concern, and that a State statute that had the effect of prohibiting witnesses from ever disclosing their testimony violates the First Amendment insofar as it prohibits a witness from disclosing his own testimony after a grand jury's term has ended.

In ruling that a Florida statute gagging grand jury witnesses was unconstitutional, this Court in *Butterworth* observed:

> Historically, the grand jury has served an important role in the administration of criminal justice. . . . At the same time, we have recognized that the invocation of grand jury interests is not "some talisman that dissolves all constitutional protections." *United States v. Dionisio*, 410 U.S. 1, 11, 93 S.Ct. 764.770, 35 L.Ed.2d 67 (1973). Indeed, we have noted that grand juries are expected to "operate within the limits of the First Amendment," as well as the other provisions of the Constitution.

Branzburg v. Hayes, 408 U.S. 665, 708, 92 S.Ct. 2646, 2670, 33 L.Ed.2d 626 (1972). See also *Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962). We must thus balance respondent's asserted First Amendment rights against [the State's] interests in preserving the confidentiality of its grand jury proceedings. . . .

We also take note of the fact that neither the drafters of the Federal Rules of Criminal Procedure, nor the drafters of similar rules in the majority of the States, found it necessary to impose an obligation of secrecy on grand jury witnesses with respect to their own testimony to protect reputational interests or any of the other interests asserted by [the State.] Federal Rule of Criminal Procedure 6(e)(2), governing grand jury secrecy, expressly prohibits certain individuals *other than witnesses* from disclosing "matters occurring before the grand jury," and provides that "[n]o obligation of secrecy in accordance with this rule." Notes on Rule 6(e)(2), 18 U.S.C. App., p. 726, expressly exempt witnesses from the obligation of secrecy, stating that "[t]he seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate." Similarly, only 14 States have joined . . . in imposing an obligation of secrecy on grand jury witnesses. Of the remaining 35 states, 21 either explicitly or implicitly exempt witnesses from a general secrecy, and 14 simply remain silent on the issue. See 2 Beale & Bryson, *supra*, n. 3, 7.05, pp. 20-21, and nn. 18-21. While these practices are not conclusive as to the constitutionality of [the] rule, they are probative

> of the weight to be assigned [the] asserted interests and the extent to which the prohibition in question is necessary to further them.
>
> Against the state interests which we have just evaluated must be placed the impact of [Florida's] prohibition on respondent's ability to make a truthful public statement. The effect is dramatic: before he is called to testify in front of the grand jury, respondent is possessed of information on matters of admitted public concern about which he was free to speak at will. After giving his testimony, respondent believes he is no longer free to communicate this information since it relates to the "content, gist, or import" of his testimony. The ban extends not merely to the life of the grand jury but into the indefinite future. The potential for abuse of the [Florida] prohibition, through its employment as a device to silence those who know unlawful conduct or irregularities on the part of public officials, is apparent.

Id. Butterworth v. Smith, 494 U.S. at 634-36.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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